APPENDIX

In The

Supreme Court of the United States

October Term, 1978

NO. 78-1595

GEORGE CALVIN LEWIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR CERTIORARI FILED
APRIL 18, 1979
CERTIORARI GRANTED JUNE 18, 1979

INDEX

RELEVANT DOCKET ENTRIES

November 21, 1977—Indictment returned.

December 1, 1977—Arraignment; plea of not guilty.

December 22, 1977—Trial; jury waived. Not guilty on Count One; guilty on Count Two. Presentence report ordered.

January 18, 1978—Sentencing. Notice of appeal filed.

January 24, 1979—Conviction affirmed by U. S. Court of Appeals.

March 19, 1979—Petition for Rehearing denied.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 11-00175-R
	)	
GEORGE CALVIN LEWIS, JR.	)	

NOVEMBER 1977 TERM—AT RICHMOND

The grand jury charges that on or about the 28th day of January, 1977, at Henrico County, Virginia, in the Eastern District of Virginia and within the jurisdiction of this Court, George Calvin Lewis, Jr., having previously been convicted by a Court of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully receive a firearm, to-wit: One (1) .32 caliber revolver, Model 30, Smith and Wesson, serial number 678858, after said firearm had been previously shipped in interstate commerce.
(In violation of Title 18, United States Code, Section 922 (h)(1).)

COUNT TWO

The grand jury further charges that on or about the 28th day of January, 1977, at Henrico County, Virginia, in the District and jurisdiction aforesaid, George Calvin Lewis, Jr., having previously been convicted by a Court of a felony, did knowingly and unlawfully receive and possess a firearm, to-wit: One (1) .32 caliber revolver, Model 30, Smith and Wesson, serial number 678858, said receipt and possession affecting commerce and after said firearm had previously been shipped in interstate commerce.
(In violation of Title 18, United States Code, App. Section 1202(a)(1).)

PROCEEDINGS

(December 22, 1977)

The Clerk:

* * *

Are counsel ready to proceed?

Mr. Metcalf: The Government is ready to proceed.

Mr. Wood: I have a motion, if it please the Court.

The Court: All right, sir.

Mr. Wood: May it please the Court, on behalf of George Lewis, the defendant in this case, we would move the Court for a brief continuance of the matter for the following reasons:

If Your Honor please, he is charged in a two-count indictment. The essence of which is that he received, in one count, and possessed in another, received and possessed a firearm, having been previously convicted of a felony.

Now, if Your Honor please, in 1961—this is the underlying charge—the only felony he has ever been convicted of, allegedly, was in 1961 in Florida where he was convicted of the alleged crime of breaking and entering with intent to commit a misdemeanor, which supposedly is felony under Florida law.

Now, the case of *Gideon* against *Wainwright,* which is a classic, came out of Florida. Gideon was charged with the identical offense as this gentleman.

Gideon was tried in the trial court in Florida approximately six months after this man was tried.

Your Honor, two days ago, or three days ago, it first came to my attention—and perhaps I was derelict in not discovering it earlier—this man in fact had no lawyer.

I called a lawyer in Florida by the name of Harper, who is in Clearwater where this case was tried.

Mr. Harper went to the court, to the records of the county

or Circuit Court where this gentleman was tried. He gave me the following information:

Number one, the record affirmatively shows that he was not represented. It is not a silent record. It affirmatively shows no lawyer.

He was asked by the trial judge on the date of trial, "Do you have a lawyer?" His response was, "No, I do not."

We would proffer evidence that he was in fact indigent at that time.

The judge proceeded to try him on that day. He ordered a pre-sentence investigation of some nature or another. Continued sentencing.

When he came back in March of 1961, I believe it was, he was sentenced to a term of from four months to, I believe, four years or six years, something like that. In addition the lawyer that we talked with in Florida, who I understand to be a very reputable lawyer, told me that in his view the indictment was invalid on its face. That a lawyer would, even a patent lawyer, would have easily have seen that. He tells me that Florida law does and has required that the indictment charge the particular Florida statute under which the gentleman is to be tried. He said the indictment showed no such charge and was invalid on its face.

Additionally, if Your Honor please, and just as importantly, when George Lewis was tried in Florida he was from Richmond. He had gone to Florida with a couple of companions and was locked up down there. He was 17 years old. His birthday is today. He was born December 22, 1943.

For some reason or another the records of the Pinellas County Circuit Court, and indeed the records that the Government has here today, show erroneously his birthday as December 22, 1941.

Now, if Mr. Harper, the lawyer that I spoke with in Florida, told me that apparently the Florida Circuit Court proceeded on the assumption that the man was an adult when in fact he was a juvenile. He tells me that in those days in Florida, Florida had what we now have in Virginia; that is, a separate juvenile system and a separate adult system. That under Florida law, as it existed at that time, this man could not be tried as an adult.

I assume if it is anything like Virginia there would have been a procedure for a transfer, in all probability. But, if Your Honor please, the Court was absolutely without jurisdiction to try this man.

Now, we are not dealing here with what could be a voidable or a potentially voidable conviction. You are dealing with a bad set of facts.

Number one, an indictment which I am told by Florida law is invalid on its face.

Number two, a man who is convicted in violation of *Gideon* against *Wainwright*. And we would proffer evidence that he was in fact indigent and could not afford counsel.

Thirdly, that the Court which tried him had absolutely no jurisdiction to try him in the first place.

The Court: Doesn't he have to exhaust his state remedies, Mr. Wood? Doesn't he have to take appropriate action to have that conviction set aside? This Court is not the proper forum for that, is it?

Mr. Wood: Judge, I would suggest to you, if it please the Court, I have read *United States* against *Allen*, 556 F.2d. 720, which was decided last year by the Fourth Circuit. That case is entirely different than the one you have here. In that case Allen was charged under Section 922(a)(6).

The Court: Six?

Mr. Wood: Yes, sir. Which was lying in order to obtain the weapon. The Fourth Circuit said over and over again he is not being convicted for possessing the firearm, having been convicted of a felony. He is being tried and convicted for lying about it, which is a different thing.

The Court cited the Fifth Circuit.

I readily admit to Your Honor that I have not researched fully the point, for which I apologize, but I have been in other courts in the last couple of days. But, Judge, they cite the Fifth Circuit in which the Fifth Circuit adopts this rule. They agree with the Fourth Circuit on the 922(a)(6) ruling, that is, if one has been convicted of a felony and one lies about it then even though—

The Court: It may be a voidable deal, but that is no defense. It is not a matter of merely being allowed to attack it collaterally or what have you. But it is no defense.

Mr. Wood: I believe, and again I apologize for my lack of research not being exhausted on this point, but the indication that I got from reading the Allen case was that the Fifth Circuit by the same token will allow a collateral attack when the gentleman is charged, as is Mr. Lewis, with the status offense. That is what we are talking about here. That is the status of being a felon.

Now, the Fourth Circuit distinguishes the Supreme Court cases. I can't remember the name. The recidivist case that went up on status and so on. Of course, the law is unsettled that punishment cannot be impressed nor enhanced where the basis for the new conviction in the case of a recidivist, or enhanced penalty, is a former invalid conviction in violation particularly of *Gideon* v. *Wainwright*.

I would emphasize to the Court, I think this makes that difference, too. We are not talking about a case where I put Mr. Lewis on and he says, "Well, I didn't have a lawyer," or something like that. The records of the Florida court

show that affirmatively. I suspect Allen may have some philosophical basis and difficulty and hardship in exploring these matters in the trial court.

The Court: I am at a loss. I do not understand the nature of your motion. You have a motion for a continuance. For what purpose?

Mr. Wood: So that I can obtain the Florida records in proper form to present to you, sir. I found out two days ago. I called Florida and got a lawyer down there who was willing to help me yesterday afternoon.

The Court: Whose fault was that, Mr. Wood? I am not fussing with you, but how long have you had the case?

Mr. Wood: For a month. And I will be honest with you, it never occurred to me that that conviction was invalid. My client is not an educated man, Judge. I am educated, presumably, and I should have caught it earlier. But when I saw the Florida conviction in 1961, I thought Gideon came out of Florida.

The Court: The difficulty is, I am not sure that you have the right to attack it in these proceedings. That is the thing that I have doubt about.

Mr. Wood: Well, the Fourth Circuit does not say I can't. It simply says that a conviction for, or that a voidable conviction cannot be a defense. Not just attack it collaterally or otherwise, or go to the State Court and exhaust and so on. But it can't be a defense in an (a)(6).

The Court: Let me hear the Government's position.

Mr. Metcalf: Well, Your Honor, first off I think that the case law is clear as to the fact that whether he was a juvenile, or the fact that there was a fatal error in the indictment, is not something that can be attacked in this court anyway. It has to be done in the place of jurisdiction to have it set aside. It is a voidable and not avoidable conviction, Your Honor, if what Mr. Wood says is true. Therefore, if it is voidable it is not within the scope of the jurisdiction before the Federal Court at this time.

The Court: Is that really factual? If what he says turns out to be factual? I don't mean that I disbelieve him. I don't mean that. But suppose they tried him as an adult when he was in fact a juvenile?

Mr. Metcalf: Your Honor, I don't know.

The Court: I guess that is voidable?

Mr. Metcalf: Yes, Your Honor.

The Court: Because we have—

Mr. Metcalf: Under Virginia law, I can only analyze with that, you can try them as an adult upon proper certification, et cetera. I don't know what occurred down there.

As to the fact that he had the statute, I think the error in the indictment is a procedural matter and not a constitutional matter. I don't think that it is a requirement at all as long as the defendant is fairly apprised of the charges against him.

The Court: Would he be cut off if he were tried here and convicted and then succeeded in having that Florida conviction set aside? Then he could come back on a 2255. Is that the way you envision it would happen?

Mr. Metcalf: It could be, Your Honor, but I think that the Allen case speaks to that, Your Honor. And the Court in that—and we are talking about Section 922—counsel draws the distinction between (h) and (a)(2). The Court doesn't. The Court is specifically talking about 922(a)(6). But it also refers to 922(d)(1). The entire section of 922 is different than 1202(a)(1), as the Court has asked me to point out in the past.

It refers, Your Honor—it says if you find that Congress intended to restrict the disposition of firearms to those with standing felony convictions, even though the conviction may later be found to be constitutionally invalid, it says

that specifically at page 722 on the second column in the first paragraph.

Further, Your Honor, it says if the act only prohibited the disposition of firearms to constitutionally-convicted felons enforcement would be complicated by collateral issues.

And it said the act alone, because under (a)(6), under the entire act, you don't have to be a convicted felon. You only need to be indicted. It says probable cause alone is sufficient to restrict the issuance of a firearm, and possession of a firearm by that individual. Therefore, Your Honor, I submit that we are not talking about whether—and in fact I can envision that this man may be indicted—let's say he was indicted yesterday and acquitted tomorrow, and he had a firearm. He would have violated the statute.

The Court: Your position, I think, coincides with the Court's understanding of the law, without pronouncing any judgment on it. Your position is that even if the conviction was set aside, he is still prosecutable under this indictment by virtue of the fact that there was an outstanding conviction as of the time of the alleged offense. Is that it?

Mr. Metcalf: Yes, Your Honor.

The Court: All right. I understand your position.

All right, Mr. Wood.

Mr. Wood: Judge, if I may respond—and I hope Your Honor has not made up his mind—but I don't read Allen that way. Allen is an (a)(6) case. They repeat that over and over.

The Court: Well, suppose I read it again, I have read it three or four times.

Mr. Wood: But they point out, and I particularly invite Your Honor's attention, to their citation of the Fifth Circuit which reaches the same result as Allen in (a)(6), but apparently—a different result in the case in which you have here.

The Court: All right. I will take a look at it.

Mr. Wood: I would suggest to the Court a juvenile who is tried as an adult without the procedural safeguards that might be prescribed by statute, that is a void and not avoidable conviction.

The Court: I don't think so in Virginia. As a matter of fact what we have to do under the Fourth Circuit's ruling is if in fact it turns out that he was a juvenile we have to reconstruct to determine whether he would have been certified to be tried as an adult even though he is a juvenile. So it is not void. I don't know the Florida law.

Mr. Wood: I don't either, Judge. That might be a proper scope of inquiry if the continuance were granted.

The Court: The Court will take a brief recess.

(A recess was taken at 10:15 to reconvene at 10:35.)

The Court: The Court has re-read Allen. I have read, in addition, the Third Circuit case of *United States* against *Davis*. I am satisfied that the alleged invalidity of the conviction is at this stage of the proceedings immaterial. The motion for a continuance is denied.

Mr. Wood: All right, Your Honor. I would object to Your Honor's ruling.

* * *

(The testimony was recorded but not transcribed.)

(The following occurred after the government rested)

Mr. Wood: All right, sir.

Judge, we call Mr. Lewis.

May it please the Court, Judge, I am not going to have him testify as to the *Gideon* against *Wainwright* matters that I have mentioned, since the Court has already ruled that that would be irrelevant.

The Court: That's right.

Mr. Wood: Otherwise I would want the record protected on that score.

(The testimony of George Calvin Lewis, Jr., was recorded but not transcribed.)

11,152 Ct. Cr. STATE OF FLORIDA vs. GEORGE C. LEWIS, JR.	)	Breaking And Entering With Intent To Commit A Misdemeanor.

The defendant, George C. Lewis, Jr., upon being caused to stand before the bar in the custody of the Sheriff, was asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him and he answering nothing in bar or preclusion thereof, the Judge pronounced the following sentence, to-wit:

"You, George C. Lewis, Jr., having entered a plea of guilty to the crime of Breaking And Entering With Intent To Commit A Misdemeanor, as charged in the Information filed herein, the Court adjudges you to be guilty of Breaking And Entering With Intent To Commit A Misdemeanor, as charged in the Information filed herein.

"It is further considered, ordered and adjudged, that you be imprisoned by confinement and committed to the custody of the department of corrections for a term of six months to four years; less the time spent in the Couny Jail of Pinellas Couny, Florida, to-wit: seventy-two days."

Thereupon the defendant was remanded to the custody of the Sheriff.

Government Exhibit No. 4.

11,153 Ct. Cr. STATE OF FLORIDA vs. GEORGE C. LEWIS, JR.	)	Breaking And Entering With Intent To Commit A Misdemeanor.

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"It is further considered, ordered and adjudged, that you be imprisoned by confinement and committed to the custody of the department of correcions for a term of six months to four years."

"It is further considered and ordered that the sentence imposed in this cause shall run concurrently with that certain sentence heretofore imposed upon you in this c- in case No. 11,152 Circuit Criminal."

Thereupon the defendant was remanded to the custody of the Sheriff.

JUDGMENT AND PROBATION/COMMITMENT ORDER

January 18, 1978

Defendant has been convicted as charged of the offense(s) of receipt and possession by a convicted felon of

a firearm which had previously been shipped in interstate commerce in violation of Title 18, U.S.C., Appendix Section 1202(a)(1) as charged in Count 2 of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and six (6) months on Count 2 of the indictment.

The defendant shall become eligible for a parole at such time as the Parole Commission may determine pursuant to Title 18, U.S.C., Section 4205(b)(2).

The execution of the sentence imposed herein is hereby suspended until 9:00 a.m. on the first business day following notification to counsel for the defendant by the United States Court of Appeals for the Fourth Circuit that they have disposed of the defendant's appeal.

Signed by U.S. District Judge.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5073

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

Argued: October 6, 1978 Decided: January 24, 1979

RUSSELL, CIRCUIT JUDGE:

This appeal presents for decision whether a defendant, charged as a convicted felon with the possession of a firearm in violation of § 1202(a)(1), 18 U.S.C. App., may defend by claiming for the first time that his felony conviction was constitutionally invalid. The facts giving rise to this question in this case are not in dispute. The defendant does not deny on this appeal the receipt and possession of a firearm. Neither does he dispute his earlier conviction in Florida or that such conviction is facially valid. It is further conceded that prior to his receipt and possession of the firearm and prior to his trial in this case, he had not collaterally attacked in any post-conviction proceeding this extant conviction. He does claim as his sole defense, though, that his felony conviction was invalid because he was denied the assistance

of counsel, and he sought to offer evidence in support of such claim. The district court refused to admit any such evidence and held that, in a prosecution under § 1202(a)(1), the defendant may not defend by seeking at trial to impeach on constitutional grounds his earlier felony conviction. After conviction, he appealed, contending that this ruling, denying him the right to attack collaterally his earlier felony conviction in his § 1202(a)(1) prosecution was in error. We perceive no error in the ruling and affirm the conviction.

The Gun Control Act, an integral part of the Omnibus Crime Control and Safe Streets Act of 1968,[1] was intended to bar certain classes of persons from possessing or receiving firearms and to limit possession of firearms to "persons who are responsible and law-abiding."[2] The right of Congress, in the interest of public safety, to enact such legislation and to establish the classifications of persons who might not possess firearms has never been questioned. *United States* v. *Samson* (1st Cir. 1976) 533 F.2d 721, 722, *cert. denied* 429 U.S. 845. Congress has identified in that Act as a class not permitted to possess or receive firearms "[a]ny person who—(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony." § 1202(a)(1). What Congress intended by this section, as the legislative history as well as the statutory

[1] The Omnibus Crime Control and Safe Streets Act of 1968 consists of two Titles relating to the possession of firearms. § 922 is a part of Title IV and § 1202 is a part of Title VII. Title IV was the original firearm section but Title VII was added during Senate consideration of the Act and was intended, according to its author, to complement Title IV. There is of course considerable overlap of the two Titles but each was seeking to deal with the same evil under similar prohibitory procedures. For a discussion of the legislative history of the two Titles, *see United States* v. *Bass* (1971) 404 U.S. 336, 341-346 and *Hyland* v. *Fukuda* (9th Cir. 1978) 580 F.2d 977, 979, note 3.

[2] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226.

language itself makes clear, is that any person within this status class of a convicted felon, whose conviction was not facially invalid and whose conviction had "not been invalidated as of the time the firearm is possessed," is subject to the statutory prohibition stated in § 1202(a)(1), and this is true though his "status as a convicted felon changed after the date of possession, *Regardless of how that change of status occurred.*" (Italics added) This was the construction given the statute by Judge Hufstedler in the earliest case to consider the application of 1202(a)(1). *United States* v. *Liles* (9th Cir. 1970) 432 F.2d 18, 20.[3]

In *Liles,* the defendant's conviction under 1202(a)(1) was affirmed "notwithstanding the fact that the prior conviction, which was an essential element of the firearms conviction, was reversed one day before he was convicted of the firearms offense. It was there held that Liles' possession of the revolver was unlawful for *one of his* status at the time he possessed it. It was not made lawful by the subsequent reversal of his prior felony conviction."[4] The rule in

[3] In *McHenry* v. *People of State of California* (9th Cir. 1971) 447 F.2d 470 at 471-472, an entirely different panel of this Circuit sought over a strong dissent to restrict *Liles* to the situation where "the prior felony conviction was reversed because of insufficient evidence" and not where it was reversed for some constitutional defect. 447 F.2d at 471. For reasons later stated herein, it appears to us that one whose conviction is invalidated for want of evidence stands in a stronger position than one whose conviction is reversed and remanded for another trial because of a constitutional defect. We agree with the comment of the dissenting judge in *McHenry,* who wrote (477 F.2d at 472):

> "After oral argument, we invited supplemental briefs and a discussion of *Liles*. The parties have been unable to distinguish it from the case before us, nor can I."

[4] (Italics in opinion) This summarization of the ruling in *Liles* is taken from *Barker, supra* (579 F.2d at 1226).

Liles was followed in *United States* v. *Williams* (8th Cir. 1973) 484 F.2d 428, 430, even though the conviction in that case had been dismissed.

Liles would seem to be applicable, whatever the basis on which the felony conviction may subsequently have been reversed or invalidated. This would include subsequent invalidation for constitutional error in the conviction.

We apprehend no legal difference between a subsequent reversal for a denial of a constitutional right and one based on some other error; both are equally invalid. It must be conceded, however, that the equities are more in favor of the defendant whose felony conviction is subsequently reversed on appeal for insufficiency of evidence than one whose conviction is reversed for failure to afford counsel to the defendant.[5] In the former case, the defendant is acquitted and found never to have been guilty; in the latter, the conviction is merely reversed and the defendant is subject to retrial and possible conviction anew. Unquestionably, the defendant in the latter case, who has not been found guilty, should have no greater right than the defendant in the former case, who was adjudged not guilty. That is, though, precisely the position of the appellant.

This position of the appellant is contrary to the manifest legislative purpose of § 1202(a)(1) and related legislation, as we declared it in *United States* v. *Allen* (4th Cir. 1977) 556 F.2d 720. In that case, we said that by its firearms legislation "Congress intended to restrict the disposition of firearms to those with *standing* felony convictions *even though the convictions may later be found constitutionally invalid.*"[6] This construction of the legislation as stated in *Allen* was also expressed by the Court in *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 69, a case cited with approval in *Allen*. In that case, the Court said:

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[5] *See, United States* v. *Williams, supra* (484 F.2d at 430).

[6] (Italics added.) 556 F.2d at 722.

> "These materials (*i.e.*, '(a) the language of the statutes, (b) the legislative history, and (c) the opinions of other courts which have endeavored to interpret the statutes') suggest that the legislative draftsmen desired persons with extant, though arguably unconstitutional, convictions to forbear from the purchase and possession of firearms until their convictions are voided by the courts or until they are freed from such disability by executive action. Failure to so refrain was intended to subject such persons to the penalties specified in the Act."

Assuredly Congress never intended that prosecutions under this legislation should be encumbered with collateral issues attacking the validity of a facially valid conviction, either because, as in *Williams,* the conviction had subsequently been reversed on account of insufficiency of evidence, or, as here, because of a constitutional claim of denial of counsel. So much we declared in *Allen,* where we said that "[t]he scheme [of prosecution under the legislation] adopted by Congress avoids the time-consuming collateral issues."[7] This view as set forth in *Allen* was recently upheld in *United States* v. *Maggard* (6th Cir. 1978) 573 F.2d 926. In that case, the Court said that "the legislative history of § 1202 indicates that Congress intended to make the proof of the fact of a prior felony conviction the sole predicate for the prohibition against possession of a weapon" and neither "Congress [nor] the Supreme Court has required or suggested that a court to which a § 1202 indictment is assigned

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[7] 556 F.2d at 723.

Allen, it is true, involved a false statement prosecution under § 922(a)(6) and not a status prosecution such as here but the quoted reasoning is equally applicable to either type of prosecution and has been generally so construed. *See, United States* v. *Bryant* (D. S.C. 1978) 448 F.Supp. 139, 144.

for trial must routinely retry the constitutional validity of the predicate offense."[8]

The appellant argues that, irrespective of legislative purpose, a conviction under § 1202(a)(1), which includes as an essential element a felony conviction, cannot stand if it can be shown in the 1202 prosecution that the defendant's constitutional right to counsel was denied at his felony conviction. This, he asserts, is the command of *Burgett* v. *Texas* (1967) 389 U.S. 109, which, in his view, makes the felony conviction "void from the outset" and not usable "for any purpose." This argument, if sustained, would mean that the Government, at any time a defendant chooses to raise the issue, would be obligated to prove in a firearms prosecution that the underlying felony conviction was free of constitutional error. *Allen* refused to read *Burgett* "so broadly" or to find, as the defendant would argue, "that a conviction in violation of *Gideon* is absolutely meaningless" in this context.[9] We declared there that Congress had a right to prohibit a person subject to an extant felony conviction, "even though * * * obtained in violation of *Gideon*," from possessing a firearm. We said:

> "Although *Burgett, Tucker* and *Loper* established that a conviction in violation of the right to counsel is too unreliable to show guilt or enhance punishment under a recidivist statute, to form the basis for an increased sentence, or to be used to impeach general credibility, they do not say that a conviction in violation of *Gideon* is absolutely meaningless. The reliability of an indictment as an indication of probable cause to believe that a certain person has committed a crime does not depend on the presence of defense counsel for those under investigation. * * * (citing cases) Nor does

[8] 573 F.2d at 928 and 929.
[9] 556 F.2d at 723.

> the absence of defense counsel or the lack of a waiver of the assistance of counsel render a prior felony conviction invalid or unreliable as an indication that the public interest requires that the convicted person's access to firearms be restricted when the conviction has not been reversed or vacated and the defendant remains unpardoned. We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*."

Graves sounded the same warning and reached the same conclusion (554 F.2d at 83):

> "As a final point, we recognize that to extend *Burgett* to prosecutions under the Gun Control Act might well create a new method of collateral attack, *i.e.*, a re-evaluation of the constitutionality of prior criminal proceedings within a trial of a weapons offense. To obtain a firearms conviction, under the approach pressed by Graves, the government would have to demonstrate the constitutional validity of outstanding convictions—at whenever a defendant so insists. Yet, there is no evidence that Congress intended this type of procedure—a 'trial-within-a-trial'—when it enacted the firearms legislation. Nor is there anything in *Burgett* or its descendants to indicate that the Supreme Court commanded such an arrangement. Consequently, this Court should not sanction a program which appears to be at variance with the intent of Congress and goes a substantial step beyond the teachings of *Burgett*."

We recognize that there are cases which take a contrary view to that expressed by us.[10] We do not find them per-

[10] *United States* v. *Pricepaul* (9th Cir. 1976) 540 F.2d 417, 424, *Dameron* v. *United States* (5th Cir. 1974) 488 F.2d 724, 727, *United*

suasive nor do they answer the thoughtful opinion of Chief Judge Haynsworth in *Allen,* and the substantial number of cases which have taken a like view with him.[11] We accordingly conclude that Congress had the constitutional power, in the promotion of public safety to prohibit under criminal penalties any person subject to an outstanding facially valid felony conviction, which, though arguably constitutionally invalid, had not been earlier invalidated, from possessing and receiving firearms and that it did so by § 1202(a)(1).

The conviction of the defendant is accordingly

AFFIRMED.

States v. *Lufman* (7th Cir. 1972) 457 F.2d 165, 167, *United States* v. *DuShane* (2d Cir. 1970) 435 F.2d 187, 190, and *United States* v. *Mason* (D. Md. 1975) 68 F.R.D. 619, 625.

[11] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226, *United States* v. *Maggard,* (6th Cir. 1978) 573 F.2d 926, 928-929, *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 80-81, and *United States* v. *Bryant* (D. S.C. 1978) 448 F. Supp. 139, 141.

The Eighth Circuit has reserved judgment on status type cases. *United States v. Edwards* (8th Cir. 1977) 568 F.2d 68, 72.

WINTER, CIRCUIT JUDGE, dissenting:

The majority decides that one prosecuted for an alleged violation of 18 U.S.C. App. § 1202(a)(1)[1] cannot defend on the ground that the prior conviction for a felony rendering his receipt or possession of a firearm a violation of law was obtained in violation of the Sixth Amendment. Because I believe that § 1202(a) does not place on the defendant the burden of affirmatively seeking to vacate a conviction manifestly invalid because of the denial of counsel, I respectfully dissent.

I.

As this case comes to us, I do not understand, as the majority asserts, that defendant concedes the "facial" validity of his earlier conviction. He asserts that the record of that conviction shows that he was unrepresented by counsel and that the conviction is void on its face. The district court declined to consider the record of the prior conviction, ruling it immaterial. In arguing the correctness of the district court's ruling, the government in effect concedes that for present purposes the conviction was obtained in violation of defendant's Sixth Amendment rights. For purposes of this appeal, we must treat that as a fact.

The majority's interpretation of § 1202(a) rests on the premise that Congress meant to punish the possession of a firearm by a person who has been convicted of a felony, even if that conviction was obtained in total disregard of his constitutional right to the assistance of counsel. I am reluctant to attribute to Congress such a cavalier attitude

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[1] § 1202(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined . . . or imprisoned . . . .

toward one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).[2] Moreover, I find insubstantial support for the conclusion.

Section 1202 was introduced as a last-minute amendment on the floor of the Senate. It is therefore doubtful that Congress gave full consideration either way to the matter of the constitutional validity of the prior felony conviction.[3] Even the opinion in United States v. Graves, 554 F.2d 65 (3 Cir. 1977), upon which the majority heavily relies, admits that "the applicable legislative record is somewhat limited in scope and does not speak directly to the precise issues raised in this case," and that the legislative intent must be gleaned from "some clues" in the statutory history. *Id.* at 73.[4]

In any event, it is axiomatic that a statute should be read, if possible, to avoid a construction that would render it unconstitutional.[5] *See, e.g.*, United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971). In my view, the majority's construction of § 1202(a) runs afoul of that rule.

[2] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Graves, 554 F.2d 65, 82 n.68 (3 Cir. 1977) (quoting Schaefer, *Federalism and State Criminal Trials,* 70 Harv. L. Rev. 1, 8 1956)).

[3] "Title VII [which includes § 1202] was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report." United States v. Bass, 404 U.S. 336, 344 (1971). The amendment, introduced by Senator Long, received a favorable but cautious reaction on the Senate floor, but suggestions for further study and modification were preempted by an unexpected call for a vote. Title VII received similarly scant attention in the House. *See id.* at 344 n.11.

[4] The majority also seeks support for its statutory interpretation in United States v. Allen, 556 F.2d 720 (4th Cir. 1977), but that case dealt not with § 1202(a) but with 18 U.S.C. § 922, which prohibits the giving of a false statement in connection with the purchase of a firearm. Unlike § 922, § 1202(a) requires a *conviction* for a felony, not merely an indictment or a statement about prior criminal activity. Thus, the reasoning in *Allen* that mere probable cause to believe that a person has committed a felony, rather than a reliable conviction, is enough to restrict his ability to possess a firearm and to support a conviction is inapplicable to § 1202(a). While § 922 is a part of Title IV of the Omnibus Crime Control and Safe Streets Act, § 1202(a) is part of Title VII of that Act. In another context, the Supreme Court has cautioned us that these titles must not be assumed to "dovetail neatly." United States v. Bass, 404 U.S. 336, 344 (1971). *See also* United States v. Graves, 554 F.2d 65, 87 (3 Cir. 1977) (Garth, J., concurring in part and dissenting in part). Moreover, as I discuss below, the exact holding of *Allen* was that § 922(a)(6) penalized making false statements rather than being a felon. Broader and more general language in *Allen* is thus dictum.

[5] The opinion in United States v. Liles, 432 F.2d 18 (9 Cir. 1970), on which the majority heavily relies to support its statutory interpretation, gives no indication that it ever considered the implications of Burgett v. Texas, 389 U.S. 109 (1967). This omission is not surprising, since the prior conviction in *Liles* was asserted to be invalid on grounds of substantive state law, not considered in *Burgett.* Nor is it surprising that on four separate occasions, the Ninth Circuit, when faced with the problem of *Burgett,* has ruled that the constitutional invalidity of a prior felony conviction may be asserted as a defense to a charge of possession or transportation of a firearm by a felon. United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976); Pasterchik v. United States, 466 F.2d 1367 (9th Cir. 1972) (per curiam); McHenry v. California, 447 F.2d 470 (9th Cir. 1971); United States v. Thoresen, 428 F.2d 654 (9 Cir. 1970).

II.

I had thought that, as a matter of constitutional law, Burgett v. Texas, 389 U.S. 109 (1967), prohibited the very thing that was done here. *Burgett* held that the record of a prior conviction which showed on its face that the conviction was obtained in violation of the right to counsel was inadmissible in a prosecution under a Texas recidivist statute. "To permit a conviction obtained in violation of *Gideon*

v. *Wainwright* [372 U.S. 335 (1963)] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.* at 115.[6] Here, defendant's receipt and possession of a firearm was illegal solely because he had been previously convicted of a felony. A necessary element of the crime was proof that he had been convicted of a felony and the government's only proof was that of a conviction which had been obtained without counsel. The conclusion is inescapable that the prior offense supported the determination of guilt for the instant offense in violation of *Burgett*.

Our decision in United States v. Allen, 556 F.2d 720 (4 Cir. 1977), does not lead to a contrary conclusion. *Allen* concerned a prosecution under 18 U.S.C. § 922(a)(6) which prohibits the making of a false statement in connection with the acquisition of a firearm. Allen had signed the prescribed form for obtaining a firearm stating that he had never been convicted of a felony. The statement was false, but Allen sought to show that the prior conviction was obtained in violation of his right to counsel. We held the validity of the prior conviction immaterial, distinguishing *Burgett* on the ground that under § 922(a)(6), unlike the Texas recidivist statute, the penalty is not for the prior conviction but rather for the untruthful statement concerning it.

III.

I do not read the majority opinion to deny the applicability of *Burgett* to § 1202(a) prosecutions; it is implicit from what it says that if Lewis had been successful in post-conviction attack on his earlier conviction, he could not have

[6] The Supreme Court has extended the rule of the inadmissibility of prior uncounseled convictions to sentencing, United States v. Tucker, 404 U.S. 443 (1972), and to impeachment of a defendant who has testified, Loper v. Beto, 405 U.S. 473 (1972).

been convicted under § 1202(a). Rather, its holding is that even an invalid, uncounseled felony conviction is sufficient to bring an accused within the § 1202(a) prohibition on firearms possession, unless the defendant has successfully taken affirmative action to overturn the invalid conviction. To my mind, *Burgett* may not be so limited.

In the first place, it is noteworthy that the Supreme Court has seen no need to impose this requirement. In *Burgett*, the prior uncounseled conviction of the defendant was held inadmissible, even though the defendant had never sought post-conviction relief to have his prior conviction overturned. Similarly, in Loper v. Beto, 405 U.S. 473 (1972), where the Supreme Court forbade the use of a prior uncounseled conviction for purposes of impeaching a defendant, the Court showed no concern over the fact that the defendant had not taken affirmative steps to have his prior conviction declared invalid. And in our own decision in Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968), we held that a state court unconstitutionally considered a prior uncounseled conviction in sentencing a defendant under a habitual offender statute, even though the prior conviction had not been collaterally attacked.

The majority notes the concern expressed in the *Graves* case that allowing a defendant in a § 1202(a) prosecution to raise for the first time the validity of his prior felony conviction would lead to a wasteful "trial-within-a-trial." In *Graves*, however, the defendant alleged that his prior felony conviction was invalid not because of a denial of counsel but rather because of failure to observe the complex due process requirements for transferring cases from juvenile courts, as announced in Kent v. United States, 383 U.S. 541 (1966). The *Graves* court noted the involved factfinding that would be necessary to determine the validity of the prior conviction and specifically contrasted

this defense with the simple assertion that a prior conviction was invalid for a denial of counsel, as in *Burgett*. Thus, one of the grounds on which *Graves* explicitly distinguished *Burgett* was that "*Burgett* was bottomed on a manifest abrogation of the right to counsel—a constitutional guarantee not asserted here." 544 F.2d at 80.[7]

In contrast to the complex attack on the prior conviction attempted by the defendant in *Graves*, Lewis asserts that it clearly appears on the face of the record of his prior conviction that he was not afforded counsel. Lewis' assertion can be quickly and easily verified without the necessity of conducting an involved "trial-within-a-trial." Indeed, every court of appeals which has addressed the issue has held that a defendant charged with possession or transportation of a firearm by a felon may defend against the charge by asserting for the first time that the prior felony conviction was invalid for denial of the *right to counsel*. *See, e.g.*, United States v. Lufman, 457 F.2d 165, 168 n.3 (7 Cir. 1972); United States v. Thoresen, 428 F.2d 654, 663-64 (9 Cir. 1970) (decided under former 15 U.S.C. § 902(e)).[8]

[7] The other cases cited by the majority to support its position are likewise inapposite, since the defendants in those cases sought to attack the validity of their prior convictions on grounds other than denial of the right to counsel. *See* Barker v. United States, 579 F.2d 1219 (10 Cir. 1978) (improper jury instructions at prior conviction; further, defendant had waived this defense by pleading guilty to firearms charge); United States v. Maggard, 573 F.2d 926 (6 Cir. 1978) (incompetent performance of counsel at prior conviction); United States v. Bryant, 448 F.S. 139 (D. S.C. 1978) (prior conviction based on uninformed guilty plea).

[8] The government's brief urges that these cases were wrongly decided and directs us instead to two cases in each of which the accused, after he was convicted of a firearms offense and then successfully obtained a court order invalidating the prior felony conviction, was granted relief from the firearms conviction under 28 U.S.C. § 2255. Dameron v. United States, 488 F.2d 724 (5th Cir. 1974); Pasterchik v. United States, 466 F.2d 1367 (9 Cir. 1972) (per curiam). By arguing that these two cases permit affirmance of Lewis' § 1202(a) conviction, the government implicitly concedes that Lewis could at some future time collaterally attack his prior conviction and, if he was successful, could then obtain § 2255 relief from the instant conviction. Since the validity or invalidity of Lewis' prior conviction is apparent from the face of the record and will not require a mini-trial, I think that this argument exults procedure over substance. From the standpoint of judicial efficiency and economy, let alone the unfairness of subjecting Lewis to suffer the indignity of a federal firearms conviction when it is quite clear that he will be able to obtain subsequent § 2255 relief, I see no reason to require it. Certainly nothing in the *Dameron* or *Pasterchik* cases *requires* a defendant to go through this convoluted procedure.

See also United States v. DuShane, 435 F.2d 187 (2 Cir. 1970).

IV.

In short, neither reason nor authority supports a rule that one previously convicted of a felony in violation of his Sixth Amendment right cannot assert the invalidity of that conviction as a defense to a prosecution under § 1202(a). Thus, I am persuaded that "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Burgett v. Texas, 389 U.S. at 115. I would therefore reverse the conviction and remand the case for a new trial with directions to receive the record of the prior offense in order to determine whether the prior conviction was obtained in violation of the Sixth Amendment. If it was, in my view defendant cannot be guilty of the crime charged.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5073

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5073

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert Merhige, Jr., District Judge.

Upon consideration of the appellant's petition for rehearing and the appellants' motion for stay of mandate, by counsel,

It is ordered that:

1. the petition for rehearing is denied;

2. the motion for stay of mandate for 30 days from the date of this order to permit the filing of a petition for a writ of certiorari is granted.

Entered at the direction of Judge Russell with the concurrence of Judge Cowan (U.S. Court of Claims). Judge Winter dissents.

SUPREME COURT OF THE UNITED STATES

No. 78-1595

GEORGE CALVIN LEWIS, JR.,
Petitioner,

v.

UNITED STATES

Order allowing certiorari. Filed June 18, 1979.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.